No. 83-1342

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

WILLIE F. ALLEN, d/b/a
WILLIE F. ALLEN JANITORIAL SERVICE,
Petitioner,

v.

GREENVILLE COUNTY,
A POLITICAL SUBDIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Plaintiff is barred under the doctrine of *res judicata* and claim preclusion from litigating an issue which has been decided against him in prior state court proceedings?

2. Whether Plaintiff is foreclosed from litigating his civil rights allegations when they clearly might have been raised in his state court lawsuit?

3. Whether the Fourth Circuit Court of Appeals misinterpreted the South Carolina law governing *res judicata* in determining that Plaintiff states only one cause of action in his state and federal lawsuits?

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the parties whose names are contained in the caption.

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STATEMENT OF CASE

On or about July 7, 1980, Appellant and Respondent entered into a contract whereunder the Appellant was to provide janitorial services to all buildings operated and maintained by the Respondent. The contract covered a period of twelve months and the contract price was $126,000.00. The contract was terminable at will by either party upon ten (10) days' written notice to the other. Respondent gave the necessary ten (10) days' notice to Appellant and terminated the contract for unsatisfactory performance after three (3) months' performance by the Appellant, and thereupon Appellant filed an action in the Court of Common Pleas for Greenville County seeking money damages for breach of contract. The State Court judge, after hearing testimony from both sides, directed a verdict for Respondent on December 11, 1981. This judgment was not appealed.

After a short time Appellant filed a suit in the U.S. District Court for South Carolina (Greenville Division) alleging that the contract had been improperly terminated because he is a black man, and the termination thereby violated his civil rights guaranteed by the Constitution of the United States and the provisions of 42 U.S. Code Sections 1981, 1982, 1983, and 1988.

The Respondent filed a Motion to Dismiss or in the alternative a Motion for Summary Judgment. Respondent also served and filed an Answer to the Complaint.

On August 12, 1982, a hearing on the Motion to Dismiss and the Motion for Summary Judgment was held before the Honorable William W. Wilkins, Judge of the Federal District Court. Subsequently, Judge Wilkins issued an Order in which he sustained the Respondent's Motion to Dismiss and Motion for Summary Judgment based on the doctrine of *res judicata* and collateral estoppel. Thereafter Appellant appealed the order of Judge Wilkins to the Fourth Circuit Court of Appeals, which affirmed the order. Appellant thereafter sought a rehearing before the three judge panel of the Fourth Circuit Court of Appeals or, in the alternative, a rehearing before the Fourth Circuit Court of Appeals *en banc*. This request for rehearing was denied, resulting in Appellant's seeking a review of the Circuit Court of Appeals' Order upon Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals, Justice Phillips dissenting, determined that Willie Allen was foreclosed from litigating his allegations of racial discrimination in the loss of his janitorial contract with Greenville County. The basis of this decision was that, once the South Carolina Court of Common Pleas had determined the County acted properly in terminating Allen's contract, he could not relitigate that determination by claiming the termination was improper because it was based on racial *animus*.

Allen's only complaint is that he lost the contract. There are a variety of reasons why a person may lose a job; unfairness on the part of the other party is one reason, incompetence is another. If however, the termination is ever found to be proper, this logically forecloses a further litigation of the propriety of the termination. The law in South Carolina provides that a contract cannot be terminated (even with a "termination at will" clause) if doing so could be inequitable or unconscionable. The state court ruled that the county terminated the contract for a proper reason, and so granted the county a directed verdict. This was not appealed, so Allen is bound by the state court finding. In this particular situation, South Carolina Courts would recognize that Willie Allen is seeking to litigate the *same* issue twice, and under the state's *res judicata* law, another lawsuit would not be allowed.

There was nothing to prevent Willie Allen from bringing his civil rights claims in the state court. He should not be allowed to bring them now, since the propriety of the contract's termination has been already determined. This is particularly true in this day of protracted and multiplicitous lawsuits.

ARGUMENT

Greenville County begins its response to the Petition for a Writ of Certiorari by reaffirming the statement which was made by Justice Dickson Phillips during oral argument in the Fourth Circuit Court of Appeals. When counsel for Willie Allen expressed his opinion that the case of *Prosise vs. Haring*, 664 F.2d 1133 (4th Cir., 1981) mandated reversal of the District Court's judgment, Judge Phillips informed counsel for both parties that, as the author of the *Prosise* opinion, it was his opinion that that case had nothing to do with Mr. Allen's situation. Allen's continued reliance of *Prosise* [and on this Court's decision in *Haring vs. Prosise*, 103 S.Ct. 2368 (1983)] thus is completely misplaced.

Prosise was limited to the holding that a criminal defendant who pleads guilty to a charge in State Court, and then attempts to raise constitutional search and seizure question in a §1983 action in Federal Court, is not barred from so doing by the doctrine of *res judicata*. It has no relevance whatsoever to the question which has already been decided by the Fourth Circuit in this case, namely, whether a civil plaintiff with a choice of forums and issues to be raised may relitigate the same "core issue" after it has been decided against him.

The only source of Justice Phillips' dissent in the Court below is his conclusion that the majority wrongly applied the facts to South Carolina Law. *Griggs vs. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949) is cited for the proposition that "successive claims are the 'same' claim for *res judicata* purposes only: 'if the same facts or evidence would sustain both'." *Griggs* involved issues of property ownership based on deeds in one case, and ownership based on adverse possession in the other. The proof of these successive issues obviously would have rested on different facts or evidence.

Griggs is readily distinguishable from the present case. In the state court trial, the County's motion for a nonsuit (based on the "termination at will" clause in the contract) was denied, based on the rule enunciated in *Philadelphia Storage Battery Co. vs. Mutual Fire Stores*, 161 S.C. 487, 159 S.E. 825 (1931). That case, also involving a contract with a "termination at will" clause, held

that a party may not terminate a contract if doing so would be inequitable or unfair to the other party, or against good conscience. 159 S.E. at 826.

> "That standard of conduct is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination." *de Treville vs. Outboard Marine Corporation*, 439 F.2d 1099 (4th Circuit, 1971) (citing *Philadelphia Storage.)*

Allen's counsel raised the possibility that the County was somehow unfair or acted inequitably in terminating its contract with Allen, and Judge Pyle denied the County's motion for a nonsuit after the plaintiff presented his case. However, after the County's witnesses testified and were fully cross-examined by Allen's counsel, Judge Pyle concluded that no issue of fact as to any inequity or unfairness on the county's part had been raised. The judge granted the county's motion for a directed verdict, ruling as a matter of law that the county's termination was lawful and pursuant to contract terms.

In his Federal court case, Willie Allen attempts to relitigate the question raised by him and decided against him in State Court, namely the propriety of the termination of his contract. Even under *Griggs*, this cannot be done. If he had proven racial discrimination at the state court trial, then certainly the issue of inequity and unfairness would have been decided differently. Under *Griggs*, the same proof which would sustain his federal claim would also have sustained his state claim. Contrary to Justice Phillips' assertion, therefore, the majority correctly applied the *Griggs* test to the facts of this case.

South Carolina Courts have not interpreted *Griggs* as literally as Allen says they have. In this regard, *Harth vs. United Insurance Company of America*, 266 S.C. 1, 221 S.E.2d 102 (1975), is helpful, as it presents a more modern view of *res judicata* than does *Griggs*. It involved twelve separate lawsuits brought on the basis of plaintiff's payment of twelve separate weekly premiums based on alleged fraudulent representations made by an insurance agent on the first of his twelve collection

visits. Although the court recognized that each of the twelve lawsuits was based on a technically different set of facts in that the subject collections were made consecutively, seven days apart, it limited plaintiff to one lawsuit for all her damages. The South Carolina Supreme Court stated at 221 S.E.2d at p. 104:

> "[T]he leading principle in a modern system of procedure is the avoidance of a multiplicity of suits, and the settlement in one action of all respective claims of the parties when they are of such nature as to admit of adjustments in one action." *Ripley vs. Rodgers*, 213 S.C. 541, 50 S.E.2d 575 (1948).
>
> The problem here in implementing this goal is the determination of what constitutes a single cause of action. It was defined in *Brice v. Glen*, 165 S.C. 509, 164 S.E. 302 (1932) as:
>
> > "a primary right possessed by plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consists in a breach of such primary right, and duty . . .
> >
> > "The cause of action has been described as being a legal wrong threatened or committed against the complaining party. And the object of the action is to prevent, or redress the wrong by obtaining legal relief. The *subject* of the action is, clearly, neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the Court; nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this ordinarily is the property, or the contract and its subject matter, or other thing involved in the dispute.' "
> > *Brice*, supra, 164 S.E. at 303, 304.

> 1 The *primary right* involved here was the respondent's right to have the agent with whom she dealt and his company faithfully carry out their *primary duty* to maintain the policy in force while receiving her money. The *wrong* is the alleged failure of the company and its agent to meet that duty and in taking and retaining the premiums for the twelve weeks described while not maintaining the policy in effect. The separate collections involved here are merely cumulative damages to the respondent concerning the invasion of the same primary right. The *subject* of the twelve actions involves the allegedly wrongful cancellation of a single insurance policy. Although respondent did not sue *ex contractu* on the policy, cancellation of the policy is, nevertheless, the *subject* of the action. The controversy would not have arisen without the existence of the insurance policy."

Similarly, the primary right in the *Allen* case is Allen's right to perform janitorial services under his contract with the county; the primary wrong of which he has complained is that his company was inequitably or unfairly denied the right to perform those services. The *subject* of both the State and Federal Court suits was the propriety or legality of the County's termination of the contract. Had Allen not been initially granted the contract, there would be no lawsuit today, and any claim of racial *animus* is just an additional cumulative *reason* why Allen says he may have unfairly lost the contract. This issue, of course, has already been decided against him.

The Fourth Circuit Court of Appeals stated: "There was but a single cause of action—the termination of the agreement. The sole injury for which Allen sought compensation was the allegedly wrongful termination of the contract. The State Court, however, determined that the termination was proper and pursuant to the contract terms." This statement is completely in accord with *Harth's* modern view of claim preclusion and indicates that the Court of Appeals agrees with the District Court's view that the single issue in both cases was the propriety of Willie Allen's losing his contract with the County. Justice Phillips' conclusion,

that the question of racial discrimination is separate from the question of the propriety of the termination of the contract, disregards the fact that the only alleged result of any racial discrimination was the unfair or unconscionable loss of the contract. Allen's brief states that ". . . a wrongful discharge is something other than a rightful discharge." Petitioner's Brief, p. 8. Obviously, the State Court determined that the discharge (or termination) was rightful, and Allen cannot now relitigate the question. Seen in this light, the majority decision is in accord with modern South Carolina *res judicata* law and should not be disturbed.

The Federal District Court of South Carolina addressed a very similar situation in *Wham vs. United States*, 458 F.Supp. 147 (1978). Wham, a former postal employee, sued the Postal Service seeking reinstatement and back pay. He lost the case on summary judgment, but subsequently brought suit (based on the same loss of his job) under the Federal Tort Claims Act. Judge Robert Hemphill dismissed this second lawsuit, among other reasons, because it was barred by the doctrine of *res judicata*. As Judge Hemphill states at 458 F.Supp. at 151:

> "Plaintiff's suit is barred by the doctrine of *res judicata*. A reading of plaintiff's complaint makes it clear that his cause of action is to review his removal from the Postal Service, not whether the plaintiff has suffered damages from a tortious act committed by the defendant.
>
> * * *
>
> "The doctrine of *res judicata* is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. *Rhodes v. Jones*. 351 F.2d 884 (8th Cir. 1965) cert. denied, 383 U.S. 919, 86 S.Ct. 914, 15 L.Ed.2d 673."

Similarly, a reading of Allen's complaint in Federal Court, which exactly restates the allegations of the State Court complaint except for general allegations of racial discrimination, reveals that it is an obvious attempt to review the termination of his contract, not an effort to raise legitimate constitutional issues.

In *Tillie vs. Glen Falls Insurance Company*, 208 F.Supp. 921 (D.C.S.C. 1962), the plaintiff first sued the sheriff and deputy of Anderson County for civil rights violations. The second suit restated the identical facts, but omitted the allegations of civil rights violations and sued for the surety company's breach of the bond given by the sheriff and his deputy. Judge Wyche, writing for the district court in *Tillie*, pointed out that "the only claim for relief against this surety company in both of the claims is the breach of the $10,000.00 official bond of Sheriff Erskine by the alleged wanton delicts of Deputy Gerrard. They are based on the same bond, the same breach thereof by the same deputy, alleged *in totidem verbis*. The surety company did not violate plaintiff's federal or state civil rights, and there was but one violation alleged. The allegation in civil action number 2733 that the deputy's action was done with intent to violate plaintiff's federal rights and did violate the same is merely a postulate to the delineation of the alleged torts. A postulate is defined as 'a position assumed without proof or one that is considered self-evident . . . a necessary assumption'." 208 F.Supp. at 923.

In *Tillie*, the Court isolated a factor which is again present in the Allen case; that is the presence of the civil rights allegations as a "postulate" of the real issue in the case—the propriety of the County's termination of Willie Allen's janitorial contract. One is not discriminated against in a vacuum: one loses certain rights because of race, as opposed to some other reason. Allen merely recites his state court allegations in the federal court complaint, and adds that the contract was lost because of his race. There was a full and fair litigation of the propriety of the termination in the first trial, and the only damage Allen alleges in either case was the loss of his contract.

CONCLUSION

Even the most restrictive interpretation of *res judicata* principles recognizes that a plaintiff cannot manufacture successive lawsuits by merely alleging a new pretext or "postulate" for relitigating issues already decided against him. Willie Allen attempts to do so in this case. The *Tillie*, *Harth* and *Wham* cases show that South Carolina Courts do recognize that the plaintiff has only "one bite of the apple" (221 S.E.2d at 105), one opportunity to seek redress for a single wrong. This is particularly true in this day of overcrowded courts and multiplicitous lawsuits.

U.S. Supreme Court Rule 17 indicates some of the factors considered by the Court in deciding whether to grant review on *writ of certiorari*. Greenville County's position is that the Fourth Circuit Court of Appeals' decision in this case in no way conflicts with any other Court of Appeals decision, nor does this decision conflict with South Carolina Supreme Court decisions such as *Harth*. Certainly there has been no departure from the usual course of judicial proceedings which would warrant this Court's exercising its supervisory powers. No important question of federal law is involved here; the Court below merely reaches the common sense conclusion that, once the South Carolina Court ruled the county had acted rightly in terminating Allen's contract, he cannot go back to court to say the termination was wrongful. That decision should not be disturbed and the petition should be denied.

Respectfully presented,
COUNTY OF GREENVILLE

BY: _____
Joseph H. Earle, Jr.,
Greenville County Attorney

And _____
Charles Richard Stewart,
Staff Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of March, 1984, forty copies of the Brief for Respondent in Opposition were delivered by mail to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543. I further certify that all parties required to be served have been served; specifically Fletcher N. Smith, Jr., Esquire, Mitchell, Smith & Pauling, 9 Bradshaw Street, Greenville, South Carolina 29601.

/s/

Joseph H. Earle, Jr.
Greenville County Attorney